

## Merit Systems Protection Board

## § 1204.14

indication would harm an interest protected by the exemption under which the deletion is made.

### **§ 1204.14 Requests for access to confidential commercial information.**

(a) *General.* Confidential commercial information provided to the Board by a business submitter will not be disclosed in response to a FOIA request except as required by this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that are believed to contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or organization that provides confidential commercial information to the government. The term *submitter* includes, but is not limited to, corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request for its confidential commercial information whenever such written notice is required under paragraph (d) of this section. Exceptions to such written notice are at paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or provide copies of the records or parts of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information received by the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information received by the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information that was received by January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter's claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will give a business submitter a reasonable period to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must state why the information is considered to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides under this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to release information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be released before determining whether to release confidential commercial information. Whenever the Board decides to release confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's objections to the release were not sufficient;

## § 1204.15

(2) A description of the confidential commercial information to be released; and

(3) *A specified release date.* The Board will forward the notice of intent to release the information a reasonable number of days, as circumstances permit, before the specified date upon which release is expected. It will forward a copy of the release notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to require release of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

(1) The Board decides that the information should not be released;

(2) The information lawfully has been published or otherwise made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted after notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the FOIA; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that release of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from release according to agency regulations issued under this section, when the submitter has an opportunity to do so at the time of sending the information or a reasonable time thereafter, unless the agency has good reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter according to Board regulations appears obviously frivolous; except that, in such case, the Board must pro-

vide the submitter with written notice of any final administrative release decision within a reasonable period before the stated release date.

## § 1204.15 Records of other agencies.

Requests for Board records that were created by another agency may, in appropriate circumstances, be referred to that agency for discussion or processing. In these instances, the Board will notify the requester.

## Subpart C—Appeals

### § 1204.21 Submission.

(a) A person may appeal the following actions, or failure to act by the Clerk of the Board, a Regional Director, or Chief Administrative Judge:

(1) A denial of access to agency records;

(2) A denial of a request for a waiver or reduced fees;

(3) A decision that it is technically not possible to reproduce electronically maintained information in the requester's preferred format;

(4) A denial of a request for expedited processing of information under this part; or

(5) A failure to decide a request for expedited processing within 10 workdays from the date of the request.

(b) Appeals must be filed with the Chairman, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001 within 10 workdays from the date of the denial. Any appeal must include a copy of the initial request, a copy of the letter denying the request, and a statement of the reasons why the requester believes the denying employee erred.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1204.22 Decision on appeal.

A decision on an appeal will be made within 20 workdays after the appeal is received. A decision not to provide expeditious processing of a request will be made within 15 workdays after the appeal is received. The decision will be in writing and will contain the reasons for the decision and information about the appellant's right to seek court review of the denial.